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No. 643

# Supreme Court of the United States.

OCTOBER TERM, 1939.

IN THE MATTER OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR.

BENTLEY W. WARREN AND CHARLES W. MULCAHY, AS THE TRUSTEES OF THE PROPERTY OF BOSTON AND PROVIDENCE RAILROAD CORPORATION,

*v.*

HOWARD S. PALMER ET ALS., AS THE TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND OLD COLONY RAILROAD COMPANY.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

ERWIN N. GRISWOLD,
JOHN NOBLE, JR.,
PAUL E. TROY,
*Attorneys for the Petitioners.*

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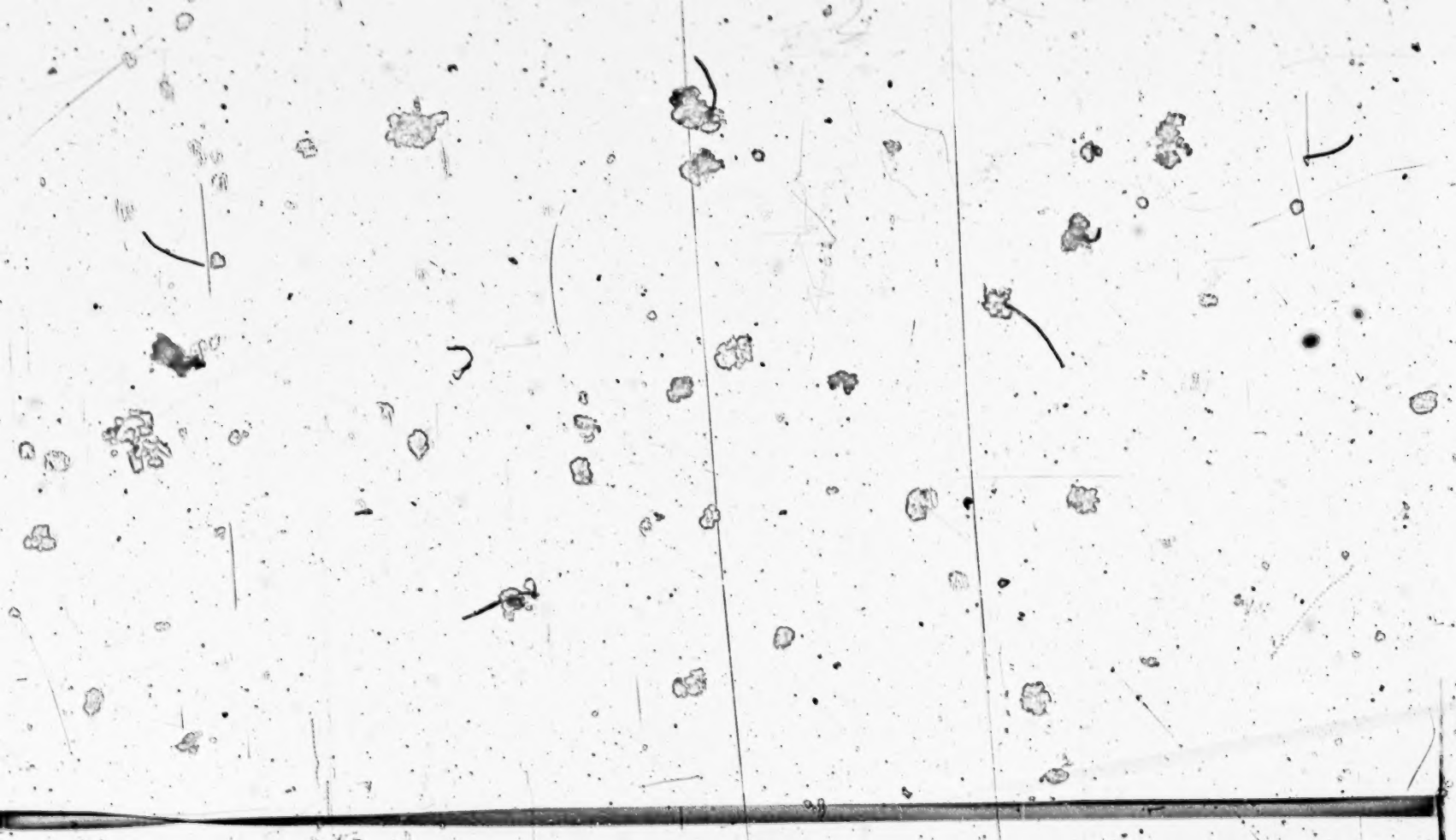
## INDEX.


| | Page |
|---|---|
| Opinions below | 2 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 3 |
| Specification of errors to be urged | 6 |
| Reasons for granting the writ | 7 |
| Conclusion | 16 |
| Appendix | 17 |
| Excerpts from Section 77 of the Bankruptcy Act as amended | 17 |


## TABLE OF AUTHORITIES CITED.


| | |
|---|---|
| Baldwin, Ex parte, 291 U.S. 610 | 12n. |
| General Motors Acceptance Corp. v. Horton, 85 F. (2d) 452 | 11 |
| Lake's Laundry, Inc., In re, 79 F. (2d) 326, certiorari denied, 296 U.S. 622 | 12 |
| Magnolia Petroleum Co. v. Thompson, 106 F. (2d) 217 | 7, 8, 9, 10 |
| Bankruptcy Act, Section 77 | 2, 3, 5, 7, 12, 15 |
| Bankruptcy Act, Section 77 (c)(6) | 4 |
| Bankruptcy Act, Section 77B | 12 |
| Judicial Code as amended by the Act of February 13, 1925, Section 240(a) | 2 |
| Gilbert's Collier on Bankruptcy (1937), 1467 | 12n. |



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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The undersigned, on behalf of Bentley W. Warren and Charles W. Mulcahy, trustees of the property of the Boston and Providence Railroad Corporation, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above cause on January 8, 1940, holding that the

United States District Court for the District of Connecticut had jurisdiction of the proceeding in question.

## Opinions Below.

The opinion and order of the District Court for the District of Connecticut (R. 251-267) is reported in 26 F. Supp. 18. The opinion of the Circuit Court of Appeals (R. 304-315) is not yet reported.

## Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 8, 1940 (R. 316-317). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

## Question Presented.

Whether the District Court for the District of Connecticut, before which proceedings for the reorganization of The New York, New Haven and Hartford Railroad Company and Old Colony Railroad Company are pending under Section 77 of the Bankruptcy Act, has jurisdiction of a proceeding to determine the existence and amount of a claim against, and impose a lien upon the property of, the Boston and Providence Railroad Corporation, which is being reorganized under Section 77 of the Bankruptcy Act in the District Court for the District of Massachusetts.

## Statutes Involved.

The statute involved is Section 77 of the Bankruptcy Act, applicable portions of which are set forth in the Appendix.

## STATEMENT.

The Boston and Providence Railroad Corporation is the owner of a line of railroad between Boston, Massachusetts, and Providence, Rhode Island, which was leased to the Old Colony Railroad Company for ninety-nine years from April 1, 1888 (R. 69-90). In 1893 the Old Colony leased its property to The New York, New Haven and Hartford Railroad Company for a term of ninety-nine years, including its leasehold interest in the Boston and Providence (R. 36-44). On October 23, 1935, the New Haven filed a petition for reorganization under Section 77 of the Bankruptcy Act in the District Court for the District of Connecticut (R. 6-8), and trustees were appointed on November 8, 1935 (R. 22-24). On June 1, 1936, the trustees gave notice rejecting the lease of the Old Colony to the New Haven (R. 29).

On June 3, 1936, the Old Colony filed a petition for reorganization under Section 77 of the Bankruptcy Act as a subsidiary debtor in the District Court for the District of Connecticut (R. 30-44), and on June 18, 1936, despite the obvious diversity of interests, the court appointed the same persons as trustees for the Old Colony as it had appointed for the New Haven (R. 51-59). This order directed the trustees of the New Haven to continue to possess and operate the properties of Old Colony, the operation to be for the account of the Old Colony or the trustees of its property. Thereafter, on May 26, 1937, the Boston and Providence Railroad Corporation filed a petition asking leave to intervene generally in the proceedings for the reorganization of the New Haven and the Old Colony (R. 62-90). On May 27, 1937, the court entered an order permitting the Boston and Providence to intervene (R. 90-91).

On October 7, 1937, the Bankers Trust Company, as trustee under the first and refunding mortgage of the New Haven, filed its petition for Order No. 217 to require the

trustees of the New Haven to cease to make any cash payments for the account of the Old Colony or its trustees under the lease of the Boston and Providence Railroad Corporation (R. 92-104). Thereafter, on July 19, 1938, the court entered Order No. 217 directing the trustees of the Old Colony to disaffirm and reject the lease of the Boston and Providence, and restraining the trustees of the Old Colony and the New Haven from making any further payments under the lease to the Boston and Providence (R. 208-210). This order provided that "the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision (c)(6) of Section 77 of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf of and for the account of the Old Colony estate but without expense to the New Haven estate."

The Old Colony and the New Haven did not at any time "elect no longer to operate the leased line;" nor did the Boston and Providence at any time file any petition with the court asking for the operation of its road as provided in Section 77 (c)(6).

The lease was thereupon rejected by notice dated July 19, 1938 (R. 211). Following the rejection of the lease of the Boston and Providence, the trustees of the New Haven and of the Old Colony filed a petition for Order No. 301, seeking approval of their account showing a deficit in the operation of the Boston and Providence Railroad from June 4, 1936, to December 31, 1937, in the amount of $3,955,298.93, and an order that this sum with interest should "constitute a lien and charge on the earnings and property of Boston and Providence Railroad Corporation in the pos-

session of this Court prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said Company . . ." (R. 212-220).

On August 4, 1938, a petition was filed by a creditor of the Boston and Providence Railroad Corporation in the District Court for the District of Massachusetts seeking the reorganization of the Boston and Providence under Section 77 of the Bankruptcy Act (R. 221-226). This petition was approved on August 5, 1938 (R. 227-228), and the petitioners were appointed trustees of the property of the Boston and Providence and qualified as such on October 18, 1938, upon the confirmation of their appointment on October 8, 1938, by the Interstate Commerce Commission.

On October 31, 1938, the Boston and Providence Railroad Corporation filed a statement with the court in Connecticut setting forth the facts of the Massachusetts proceedings and the appointment of trustees for the Boston and Providence, and contending that under Section 77 of the Bankruptcy Act the Massachusetts court had "exclusive jurisdiction of the debtor and its property wherever located"—that consequently the District Court in Connecticut had no jurisdiction over the property of the Boston and Providence, or its trustees, and thus was without jurisdiction to enter the requested Order No. 301 (R. 244-246). No appearance was entered on behalf of the trustees of the Boston and Providence.

On January 16, 1939, the court entered its memorandum and order overruling the jurisdictional objections of the Boston and Providence (R. 251-267). On February 14, 1939, the petitioners, as trustees of the property of the Boston and Providence Railroad Corporation, pursuant to authority granted by the District Court for the District of Massachusetts, filed a petition for leave to intervene specially for the limited purpose of joining in and prosecuting an appeal from the order of the court overruling the jurisdic-

tional objections to the petition for Order No. 301, and of defending against the claims contained in that petition (R. 268-269). An order to this effect was entered on the same day (R. 270), and the appeal was also allowed the same day (R. 273).

The Circuit Court of Appeals affirmed this decision holding that the District Court in Connecticut had jurisdiction to entertain the petition for Order No. 301, to adjudicate the claims involved, and to create a lien upon the property of the Boston and Providence. This is the decision which is sought to be reviewed here.[1]

## Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming the order of the District Court.

2. In holding that the District Court for the District of Connecticut had jurisdiction to determine the existence and amount of any claim against, and impose a lien upon the property of, Boston and Providence Railroad Corporation of its trustees.

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[1] Following the jurisdictional decision, the District Court proceeded to a hearing on the merits. It determined a deficit in the amount of $3,955,298.93 against the Boston and Providence for the period through December 31, 1937, and declared that the "said amount be and it hereby constitutes a lien, charge or claim on the earnings and property of Boston and Providence Railroad Corporation, prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said corporation." An appeal from this decision on the merits was heard by the Circuit Court of Appeals below at the same time as the appeal from the jurisdictional decision. The Circuit Court of Appeals reversed the decision on the merits and sent the case back for further proceedings in the District Court (R. 315). The petitioners raise no question in the present proceeding as to the decision of the court below on the merits, except so far as the question of jurisdiction was saved in the appeal upon the merits.

3. In holding that the trustees of the New Haven and of the Old Colony had physical possession of the property of the Boston and Providence Railroad Corporation.

4. In holding that physical possession of the property of the Boston and Providence by the trustees of the New Haven and Old Colony appointed by the Connecticut court gave to that court jurisdiction to determine claims affecting the title to that property.

5. In holding that the lien which the New Haven and Old Colony trustees sought to have imposed upon the property of the Boston and Providence was a sufficient property interest, before its adjudication, to give jurisdiction to the Connecticut court to adjudicate it and impose it upon the Boston and Providence estate.

6. In holding that the "exclusive jurisdiction" over the Boston and Providence "and its property wherever located," given to the Massachusetts court by Section 77 of the Bankruptcy Act, would permit the existence of jurisdiction over the Boston and Providence or its property in the Connecticut court.

## Reasons for Granting the Writ.

1. The decision below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Magnolia Petroleum Co.* v. *Thompson,* 106 F. (2d) 217, in which this Court has granted a writ of certiorari, December 4, 1939, No. 481, October Term, 1939.

In the *Magnolia Petroleum* case, the trustee of the property of a railroad in reorganization under Section 77 of the Bankruptcy Act, applied to the court for instructions as to his right to drill for oil under the surface of the land occupied by the railroad. The trustee claimed to own the fee of the land, while adverse claimants contended that the railroad had only a right of way, leaving the underlying fee

in the railroad's grantors. The "first question presented" on the appeal was "the jurisdiction of the district court as a court of bankruptcy to determine in a summary proceeding the adverse claims to the fee title to the land" (106 F. (2d) at 222). The trustee contended that the court had jurisdiction because he was in actual possession of the land.

The court considered the conveyances upon which the trustee relied, and held that they granted only an easement. From this it held (106 F. (2d) at 228): ". . . it follows that the possession of the trustee and his grantors under the deed did not extend to the oil and gas underlying the land." The court then stated its conclusion as to the jurisdiction of the District Court (106 F. (2d) at 228):

> "We hold that the petition on its face showed that the petitioner was not in possession, actual or constructive, of the mineral, oil and gas rights underlying the railroad right of way over and across the three tracts of land in the deeds relied upon; that, consequently, the court was without jurisdiction to make the order appealed from; and that the order was wholly void."

In the *Magnolia Petroleum* case the division of property interests was physical. Here it may be said to be chronological. This does not affect the analogy, however, as far as possession is concerned. Here the trustees of the New Haven and of the Old Colony had only a leasehold interest in the property of the Boston and Providence, and they lost even this when they rejected the lease. The underlying fee remained in the Boston and Providence just as title to the subsoil remained in the grantors in the *Magnolia Petroleum case*. Thus the decision below, that the fee interest of the Boston and Providence is subject to the jurisdiction of the Connecticut District Court, is in conflict with the decision in the *Magnolia Petroleum* case.

Moreover, the conflict is one of substance. The effect of the decision in the *Magnolia Petroleum* case is that persons who have granted an interest in property may not be compelled to come into their grantee's bankruptcy proceedings and submit their remaining interest in the property to the jurisdiction of the bankruptcy court. The decision below is that a corporation which has granted a leasehold in its property *can* be compelled to submit its rights in the fee to the jurisdiction of the lessee's bankruptcy court.

It is doubtless true that this Court granted the writ in the *Magnolia Petroleum* case because of the conflict which developed on the issue whether the deeds in question granted the fee or only an easement. This does not negative the conflict which now exists with the decision below on the jurisdictional question. Indeed, it emphasizes it. The conflict as to the nature of the interest granted by the deeds is immaterial except on the assumption that the court below in the *Magnolia Petroleum* case did not have jurisdiction if the railroad did not have the fee. In the present case there can be no pretense that the New Haven or Old Colony owned the fee of the Boston and Providence.

The conflict is emphasized when the language of the opinion below is examined. The court below says (R. 307) that the argument that the fee of the Boston and Providence was not subject to the jurisdiction of the Connecticut court "misconceived the nature of the doctrine, which depends merely upon possession in the natural sense that the court's officers are in control of the property de facto and can exclude all others." Yet in the *Magnolia Petroleum* case it was held that "possession" of the trustee and the railroad under the easement "did not extend to the oil and gas underlying the land" (106 F. (2d) at 228)[2]—though it was clear

[2] Earlier in its opinion (106 F. (2d) at 222) the court recited the agreement of counsel that, if the deeds granted only an easement, the railroad did not have possession of the underlying oil

that "the court's officers [were] in control of the property de facto and [could] exclude all others." The court below held (R. 307):

> "Were it necessary that the Court should have possession of the insolvent's legal interest in order to adjudicate it, it would follow that every erroneous judgment would be beyond its proper jurisdiction."

Yet that is just what the court in the *Magnolia* case held. Its decision was not merely that the court below there had acted erroneously in construing the deeds to grant a fee, but that "the court was without jurisdiction" to make the order appealed from; and that the order was wholly void (106 F. (2d) at 228).

The court below seems to recognize its own lack of jurisdiction when it says (R. 308): "It may possibly be true that the Connecticut court will have to resort through its trustees to the Massachusetts court to realize upon the lien." Why should the Connecticut court have jurisdiction to impose a lien which it cannot enforce? Why should the Massachusetts court, which can enforce the lien, and upon which falls the obligation to reorganize the Boston and Providence, have its hands tied through the creation of an overwhelming lien by another court where the Boston and Providence is not and cannot be in reorganization? How can the Connecticut court have jurisdiction to impose a lien "prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness of said company," when the other claims against the Boston and Provi-

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and gas, "from which it would follow that the court was without jurisdiction." Quite apart from the fact that counsel cannot stipulate the law, it is clear from the opinion in the *Magnolia* case that the court actually considered and decided this question as a matter of law, and that the decision is not a mere reflection of an unwarranted concession by counsel.

dence estate are not, and cannot be, before the Connecticut court?

The court below seems to be engaging in a clear case of judicial boot-strap lifting when it says (R. 309): "The lien [claimed by the New Haven and the Old Colony] is as much their 'property' as the encumbered fee is the Boston and Providence's . . ." Yet, is it not clear that the Connecticut court cannot create a lien unless that court has jurisdiction? How can it be said that that court has jurisdiction because the lien is the property of the New Haven and the Old Colony when the very question of the existence of the lien depends upon the jurisdiction of the Connecticut court? To assert that the court has jurisdiction to create a lien because the lien so created is property within its jurisdiction is seemingly to engage in a question-begging circle.

2. The decision below is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *General Motors Acceptance Corp.* v. *Horton*, 85 F. (2d) 452. In that case the vendor of an automobile sought to regain possession of it from his vendee's trustee in bankruptcy. The court directed its return, holding that the transaction in question was a lease. It said (85 F. (2d) at 453):

> "If the transaction was a conditional sale, title to the automobile was in the vendee and passed to its trustee in bankruptcy as of the date of the filing of the petition; but if the contract was a lease, title did not pass and the property belongs to the appellant."

Thus, despite the fact that the vendee was in possession of the property, the court held that possession was not determinative, but title; and that when the transaction was a lease, the lessor's interest was not subject to adjudication in the bankruptcy court.

In the present case the transaction was unquestionably a lease; yet the court below held (R. 307) that jurisdiction "depends merely upon possession in the natural sense that the court's officers are in control of the property de facto and can exclude all others."[3]

The decision below is also in conflict with that court's own decision in *In re Lake's Laundry, Inc.*, 79 F. (2d) 326 (1935), certiorari denied, 296 U.S. 622 (1935), in which Judge Learned Hand, the author of the opinion below, filed a dissenting opinion. In the *Lake's Laundry* case the court below held that property sold to a debtor under conditional sales contracts was not subject to the jurisdiction of the court in which the debtor was being reorganized under Section 77B of the Bankruptcy Act (identical in wording with the provision of Section 77 involved here). It would seem that the present case of a lessor's interest should *a fortiori* lead to the same conclusion.

3. The decision below does violence to the plain language of the statute which has given "exclusive jurisdiction of the debtor and its property wherever located" to the Massachusetts District Court in which the Boston and Providence is being reorganized. It cannot be denied that the decision below flies in the teeth of this clear and specific language. Such a result should not be justified by "construction."

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[3] That jurisdiction under Section 77 depends upon ownership and not possession has been recognized by this Court in *Ex parte Baldwin*, 291 U.S. 610, 615 (1933), where the Court said: "All property in the possession of a bankrupt *of which he claims ownership* passes, upon the filing of a petition in bankruptcy, to the custody of the court of bankruptcy." (Italics ours.) See also Gilbert's Collier on Bankruptcy (1937), 1467: "Sec. 77 thus shifts from the former bankruptcy notions of possession to that of title in determining the court's jurisdiction over the debtor's property and its consequential power to control it."

The court below, as has been pointed out, sought to get around this statutory direction by the process of assuming that the lien in question was the property of the New Haven and Old Colony. The question-begging nature of this process has already been suggested.

The mere fact that it might be convenient or desirable, from the New Haven point of view, to have all matters determined in the Connecticut court does not furnish a basis for overriding the clear and specific direction of Congress. Congress has made no provision for the reorganization of non-subsidiary lessors in the same proceedings with their lessees. That it might have been advantageous to the lessees if Congress had done so is beside the point. Congress has specifically provided that the Boston and Providence shall be reorganized in Massachusetts and only in Massachusetts. It has provided in terms that the Massachusetts court shall have "exclusive jurisdiction over the debtor and its property wherever located." It cannot have contemplated that some other court should have the power to adjudicate an overwhelming lien against the Boston and Providence, which the Massachusetts court might only mechanically or perfunctorily enforce. That is not "exclusive jurisdiction over the debtor and its property wherever located." That is mere ancillary action. But the Massachusetts court is not a mere ancillary court in the reorganization of the Boston and Providence. It is not merely the primary court in that reorganization—it is the *only* court which Congress has vested with jurisdiction in that proceeding.

Congress has not seen fit to provide for a single court for the reorganization of the New Haven system, including its lessors. Yet the effect of the decision below is to do just that despite the plain provision of the statute to the contrary. That result cannot be justified on the ground

of convenience. Convenience to the New Haven, it may be—but that is not ground for deciding all questions in the Connecticut court. See *Palmer* v. *Massachusetts*, decided November 6, 1939, No. 7, October Term, 1939. And the reorganization of the Boston and Providence should not be governed from the point of view of the New Haven. It is the Massachusetts court to which Congress has given "exclusive jurisdiction" of the Boston and Providence "and its property wherever located." That clear mandate of the statute discloses the intention of Congress as to the forum in which claims against the Boston and Providence and its property should be liquidated. The courts should not override the statute either by assuming that some of the Boston and Providence's property is before the Connecticut court or by assuming a one-sided "convenience" which Congress did not make material when it legislated.

4. The opinion below decides an important question of federal law which has not been, but should be, settled by this Court. As this Court pointed out in *Palmer* v. *Massachusetts*, No. 7, October Term, 1939: "About a fourth of the railroad mileage of the country is now in bankruptcy." It is well known that a large part of this mileage is operated under lease, and that lessors will almost invariably have to be reorganized when their lessees default on the leases. The question of jurisdiction in the reorganization of these lessors is obviously a question of practical and public importance. Under the decision below, though the Massachusetts court alone has power to reorganize the Boston and Providence, it is in fact left no real control over that reorganization. That decision divides the desired exclusive jurisdiction into a dual jurisdiction. Indeed, it converts the Massachusetts court into a subordinate tribunal to the

Connecticut court. It elevates the latter into the position of creator of liabilities of the Debtor and emasculates the power of the former, which should be fundamental in any bankruptcy court, to determine the existence and amount and priority of liabilities of the Debtor, declared by the statute, although denied by the decision below, to be subject to the exclusive jurisdiction of the Massachusetts court. The well-recognized power of reorganization trustees to raise funds through trustee's certificates, for example, is plainly nullified if there is power existing in some other court to impose a lien on the former lessor's property "prior to any mortgage or other lien, charge or claim thereon and prior to any other indebtedness." Yet the court below concedes this obstructive, indeed destructive, jurisdiction to the Connecticut court. The inescapable consequence of such a division of jurisdiction would be to destroy the primary court's power to reorganize its debtor.

One of the plain purposes in the enactment of Section 77 of the Bankruptcy Act was to establish a single court which should have "exclusive jurisdiction" to reorganize a railroad corporation. The effect of the decision below is to bring back in substance much of the confusion and difficulty which attended the old system of primary and ancillary receiverships. The decision below, depriving the Massachusetts court of its exclusive jurisdiction to reorganize the Boston and Providence in any practical sense, thus negatives the apparent and salutary purpose of Section 77 and presents a highly important question of federal law which should be finally determined by this Court.

## Conclusion.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

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January, 1940.

## APPENDIX.

### *Excerpts from Section 77 of the Bankruptcy Act as Amended.*

*Section 77-(a).* Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"): *Provided,* That when any railroad, although engaged in interstate commerce, lies wholly within one State, such proceedings shall be brought in the Federal district court of the district in which its principal operating office in such State during the preceding six months or the greater portion thereof has been located. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in addition to the fees required to be collected by the clerk under other sections of this Act. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose.

. . . . . .

*Section 77-(c) (6).* If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended.

. . . . . .

*Section 77-(c) (10).* The judge may direct the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

. . . . . .

*Section 77-(j)* . . . The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.